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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

DOUGLAS ANTHONY BEEKS,

Defendant and Appellant.

F042880

(Super. Ct. No. 100972)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Patricia L. Watkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, John G. McLean and Harry J. Colombo Deputy Attorneys General, for Plaintiff and Respondent.

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The trial court sentenced appellant Douglas Anthony Beeks (Beeks) to 25 years to life plus two years imprisonment after a jury found him guilty of personal property grand

*Before Buckley, Acting P.J., Wiseman, J., and Cornell, J.

theft (Pen. Code,¹ § 487, subd. (c)) as a third strike offense (§§ 667, subds (c)-(j), 1170.12, subds. (a)-(e)) enhanced by two special allegations for serving in state prison (§ 667.5, subd. (b)). The trial court also ordered Beeks to serve 6 months concurrently for resisting arrest. (§ 148.) Beeks contends on appeal that the trial court denied him due process of law by admitting testimony of an incompetent witness and further asks this court to review independently the relevancy of excluded peace officer personnel records. We will affirm the judgment.

BACKGROUND

At approximately 10:45 p.m. on December 23, 2002, Beeks approached developmentally disabled 30 year-old Mark Cantrell at the Bakersfield bus station. Beeks asked Cantrell for money and told him he was going to kill him. When Cantrell refused, Beeks reached into Cantrell's pocket, took his wallet, and ran away. The wallet contained \$60 in cash along with Cantrell's birth certificate, medical card, bus pass, and a Barnes & Noble bookstore membership card.

Bakersfield Police Officer Lester Riddle immediately interviewed Cantrell and reported Beeks's description to other officers in the area. At approximately 11:00 p.m., Officer Matthew Roy observed Beeks walking along the street. Officer Roy illuminated Beeks with a spotlight and exited his patrol car. When the officer asked if they could speak, Beeks ran in the opposite direction. Officer Roy pursued Cantrell into a hotel, where he saw Beeks toss some items into a bathroom. Beeks eventually tripped and Officer Roy apprehended him. In the bathroom, the officer found three \$20 bills, a Barnes & Noble membership card, and a birth certificate bearing Cantrell's name.

Officer Riddle met Beeks at the hotel and took him to the central receiving facility for booking. At the facility, Officer Riddle searched Beeks and found two bus passes in

¹ Further statutory references are to the Penal Code unless otherwise indicated.

his jacket pocket. The name “Mark Cantrell” was printed on the back of one of the passes.

DISCUSSION

I. Witness competency

Beeks contends he was denied due process of law under the Fourteenth Amendment to the United States Constitution because the trial court improperly admitted incompetent witness testimony. Beeks believes the trial court abused its discretion in denying his motion to exclude Cantrell’s testimony even though the prosecution acknowledged he was “mentally challenged” and “mentally retarded.”

“In general, every person, irrespective of age, is qualified to be a witness. (Evid.Code, § 700; [citation].) A witness is disqualified from testifying only if he or she is incapable of expressing him or herself so as to be understood, or is incapable of understanding the duty of a witness to tell the truth. (Evid.Code, § 701, subd. (a); [citations].) The party challenging the witness bears the burden of establishing lack of competence. [Citations.] Whether a witness has the capacity to communicate and an understanding of the duty to testify truthfully is a preliminary fact to be determined exclusively by the trial court, whose determination will be upheld absent a clear abuse of discretion. [Citation.] A witness who is disqualified from testifying is unavailable for purposes of Evidence Code section 1360. (Evid.Code, § 240, subd. (a)(2).)” (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1368.)

Beeks suggests the “real problem” with Cantrell was that he was unable to understand his duty to tell the truth as required under Evidence Code section 701, subdivision (a)(2). As evidence of Cantrell’s limited understanding of veracity, Beeks points to the following dialogue between Cantrell and the prosecutor on redirect examination:

“Q. Mark, you know the difference between the truth and a lie right?

“A. Wrong from right.

“Q. Wrong from right. If I were to tell you that my shirt was

blue --

“A. Not anymore, you changed it, because your shirt is white.

“Q. If I were to tell you it was blue, would that be a lie or would it be the truth?

“A. The truth.

“Q. This shirt’s blue.

“A. No.

“Q. So would that be wrong or would it be right?

“A. It’s white. [¶] ... [¶]

“Q. If I told you that it was blue --

“A. You changed the colors.

“Q. I would have changed it. So by me telling you that it’s blue, is that right or wrong?

“A. White.

“Q. It’s right that it’s blue?

“THE COURT: White.

“[PROSECUTOR]: White. Sorry. I got it. Let me try something else.

“Q. How about a brown suit. If I were to tell you that this brown suit is green --

“A. Green?

“Q. Yeah. Would that be right or wrong?

“A. Right.

“Q. It would be correct?

“A. I personally can’t tell. Looks green to me.

“[PROSECUTOR]: I’m sorry.

“THE COURT: Green to me too.

“[PROSECUTOR]: I’m sorry.

“THE COURT: Maybe we ought to ask you that question.

“[PROSECUTOR]: I ought to ask my wife. Sorry.

“Q. Mark, if I told you that this was black, my suit was black, would that be the truth or a lie? Would it be right or wrong?

“A. Right.

“Q. It would be right? You think my suit’s black?

“A. No.

“Q. So that would be wrong.

“A. That’s true.

“Q. If I told you that my suit was brown or green, would I be telling the truth?

“A. Yeah, you’re telling the truth.

“Q. If I told you it was black, would I be lying?

“A. No.

“Q. No?

“A. It’s green.”

At the close of the prosecution’s case, Beeks moved for an acquittal based on Cantrell’s incompetence. (Pen. Code, § 1118.1.) Beeks argued Cantrell was unable to respond to questions in a rational manner, did not understand the questions, and lacked the capacity to respond. Rejecting Beeks’s challenge, the trial court ruled:

“Based on the testimony of the witness and sitting next to him here and observing him for at least 30 to 40 minutes, I’m going to find that his testimony indicated an ability to differentiate between truth and falsehood, find that he did understand the duty to tell the truth at the time he testified.

“Some words it did not appear that he understood, but I think the gentleman was able to articulate what occurred. He was asked several different -- he was asked about the events in several different ways, and then reasked, and I find that when I consider the totality of the testimony that he was competent to testify because he could differentiate between truth and falsehood.

“He had a little trouble with the suit example and he could get the colors right. I’m not sure if he understood the words true or false or lie, but he did indicate to us that he understood what the truth and what a lie meant and, therefore, we are going to find that he is competent.”

Notwithstanding the above puzzling line of testimony in which not only Cantrell but also the prosecutor and the trial court became confused, Cantrell was able to relate the salient facts concerning the incident at the bus station. Although Cantrell occasionally provided unresponsive answers to the questions posed, he nevertheless consistently provided a description of Beeks as the person who accosted him and stole his wallet. Beeks failed to demonstrate Cantrell was an incompetent witness who was incapable of expressing himself or of understanding the duty to tell the truth. (Evid. Code, §§ 700, 701, subd. (a).)

Even excluding Cantrell’s testimony, however, it was not reasonably probably the jury would have reached a verdict more favorable to Beeks. (*Chapman v. California* (1967) 386 U.S. 18.) Cantrell reported a theft and description of the suspect to the police. The police shortly thereafter apprehended Beeks and recovered exactly \$60 and Cantrell’s Barnes & Noble membership card, birth certificate, and bus pass either directly from him or at the immediate scene of the arrest. Absent any explanation as to why Beeks possessed Cantrell’s personal belongings, the jury could reasonably infer Beeks personally took them from Cantrell against his will.

II. Review of Peace Officer Personnel Records

Beeks filed a pretrial motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 requesting complaints related to Officer Riddle’s conduct with the Bakersfield Police Department. The trial court granted the motion, conducted an in camera hearing to

review Officer Riddle's personnel record, and found no discoverable information. Beeks asks this court to review the trial court's ruling.²

"Peace officer personnel records ... are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." (Pen.Code, § 832.7, subd. (a).) "A motion for discovery of peace officer personnel records is 'addressed solely to the sound discretion of the trial court.' [Citation.] A review of the lower court's ruling is subject to an abuse of discretion standard." (*People v. Gill* (1997) 60 Cal.App.4th 743, 749; see also *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1145.)

"Together, sections 1043 and 1045 of the Evidence Code establish a two-step procedure for discovery of peace officer personnel records by a criminal defendant. First, section 1043 requires the defendant to file a written motion for discovery of peace officer personnel records.... (Evid.Code, § 1043, subd. (b)(2), (3); [citation.] ... 'Evidence Code section 1045 specifies that once the moving party has made a showing of good cause for disclosure of peace officer personnel records, the trial court proceeds to an in chambers examination of the records to determine whether they have any relevance to the issues presented in the current proceedings.' [Citation.] Thus, the trial court's decision to release information requires a finding of relevance. [¶] ... [¶]"

"[O]nly documentation of past officer misconduct which is *similar* to the misconduct alleged by defendant in the pending litigation is relevant and therefore subject to discovery. [Citations.] This is because 'evidence of habit or custom [is] admissible to show that a person acted in conformity with that habit or custom on a given occasion.' [Citation.] Similarly, 'evidence of reputation, opinion, and specific instances of conduct is admissible to show, inter alia, motive, intent, or plan.' " (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019-1021.)

² The record on appeal has been augmented to include the reporter's transcription of the in camera proceedings and the personnel documents reviewed by the trial court.

Even assuming, without finding, that Beeks established good cause to warrant the trial court's in camera review of Officer Riddle's personnel records, we find them properly excluded from discovery. According to Beeks's *Pitchess* motion, he sought to admit the police records in anticipation of discovering citizen complaints of dishonesty that would place Officer Riddle's portrayal of the incident in doubt. After conducting our own independent review of the in camera proceedings and the confidential personnel records, we conclude they do not relate in any way to the alleged misconduct. There is no evidence that Officer Riddle ever withheld or falsified material facts in reporting the events of an investigation. Indeed, there is no evidence in the personnel files placing Officer Riddle's credibility or moral turpitude in question. We thus find nothing presented at the *Pitchess* hearing that would have justified the release of Officer's Riddle's personnel records. Accordingly, the trial court properly exercised its discretion by excluding the personnel files from disclosure.

DISPOSITION

The judgment is affirmed